

CLOSED SESSION MINUTES
of the
STATE AGRICULTURE DEVELOPMENT COMMITTEE

May 26, 2011

Members Present

Douglas Fisher, Chairperson (Left meeting at 12:38 p.m.)
Richard Boornazian (rep. DEP Commissioner Martin)
Ralph Siegel (rep. State Treasurer Andrew P. Sidamon-Eristoff)
Brian Schilling (rep. Executive Dean Goodman)
Alan Danser
Torrey Reade
Jane Brodhecker
Denis Germano (Arrived at 9:10 a.m. and left at 11:42 a.m.)
James Waltman (Arrived at 9:12 a.m.)

Members Absent

James Requa (rep. DCA Commissioner Grifa)

Susan E. Payne, Executive Director
Jason Stypinski, Deputy Attorney General

Others present as recorded on the attendance sheet: Robert Baumley, Heidi Winzinger, Hope Gruzlovic, Brian Smith, Charles Roohr, Timothy Brill, Cassandra McCloud, Daniel Knox, Paul Burns, David Kimmel, Steve Bruder, Patricia Riccitello and Sandy Giambrone, SADC staff, Nicole Crifo, Governor's Authorities Unit.

Note: Mr. Germano left the meeting at this point.

A. Real Estate Matters - Certification of Values

Mr. Burns advised that the Committee that Ed Ireland, the other SADC review appraiser has been hospitalized recently and will be out of the office for some time. He was not at liberty to give specifics but hoped that Mr. Ireland would be back soon.

Mr. Burns stated that the Committee has been provided with the individual certification reports via the website and in its meeting binders. He indicated that if the Committee has any questions on any of the values a discussion could take place. Mr. Burns briefly discussed each certification with the Committee and stated that staff recommendation is to certify the development easement values for the following landowners as presented and discussed:

County Planning Incentive Grant Program

1. Claire Bartholomew
SADC #08-0097-PG
Block 5, Lot 6
Harrison Township, Gloucester County, 21 Acres
Development Easement Value at \$12,500.00 per acre based on current zoning and environmental regulations in place as of June 30, 2009 only.
2. Alfio and Mary T. Patane
SADC #08-0110-PG
Block 252, Lot 2
Greenwich Township, Gloucester County, 126 Acres
Development Easement Value at \$12,300.00 per acre based on current zoning and environmental regulations in place as of June 30, 2009 only.
3. Santo John Maccherone
SADC #08-0108-PG
Block 45.28, Lots 1 and 3, Harrison Township, Gloucester County
Block 1205, Lot 1, East Greenwich Township, Gloucester County
76 Total Acres
Development Easement Value at \$22,000.00 per acre based on current zoning and environmental regulations in place as of June 30, 2009 only.
4. Ocean County/Grant Farm North
SADC #15-0016-PG
Block 81, Lot p/o 2
Plumsted Township, Ocean County, 122 Acres
Development Easement Value at \$14,300.00 per acre based on current zoning and environmental regulations in place as of August 1, 2010 only.
Certification of Value is contingent upon the subject property, Block 81, Lot 2 being subdivided prior to closing in accordance with the application and two appraisals that are the subject of the certification report.
5. Ocean County/Grant Farm South
Block 81, Lot p/o 2
Plumsted Township, Ocean County, 116 Acres
Development Easement Value at \$14,400.00 per acre based on current zoning and environmental regulations in place as of August 1, 2010 only.

Certification of Value is contingent upon the subject property, Block 81, Lot 2 being subdivided prior to closing in accordance with the application and two appraisals that are the subject of the certification report.

Action to be taken in open session.

Nonprofit Grant Program

1. Hunterdon Land Trust Alliance/Gordeuk Trust (Moody)
SADC #10-0056-NP
Block 23, Lots 17 and 17.03
Kingwood Township, Hunterdon County, 26 Acres
Development Easement Value at \$10,400.00 per acre based on current zoning and environmental regulations in place as of March 7, 2011 only.
2. Hunterdon Land Trust Alliance/Harder
SADC # 10-0057-NP
Block 11, Lots 2 and 2.06
Holland Township, Hunterdon County, 112 Acres
Development Easement Value at \$6,000.00 per acre based on zoning and environmental regulations in place as of January 1, 2004 and \$6,000.00 per acre based on current zoning and environmental regulations in place as of April 6, 2011.

Action to be taken in open session.

State Acquisition (Easement)

1. Zoe Sarbanes Pappas
SADC #17-0205-DE
Block 18, Lot 2
Mannington Township, Salem County, 153.68 Acres
Development Easement Value at \$5,500.00 per acre based on current zoning and environmental regulations in place as of April 24, 2011 only.
2. Coombs Properties, LLC
SADC #06-0062-DE
Block 79, Lot 7, Upper Pittsgrove Township, Salem County
Block 1401, Lot 10, Pittsgrove Township, Salem County
Block 103, Lot 4, Upper Deerfield Township, Cumberland County
121 Total Acres
Development Easement Value at \$6,400.00 per acre based on current zoning and environmental regulations in place as of March 30, 2011 and April 8, 2011 only.

3. Robert and Barbara Holcombe
SADC #10-0193-DE
Block 34, Lot 34
East Amwell Township, Hunterdon County, 92 Acres
Development Easement Value at \$13,500.00 per acre based on current zoning and environmental regulations in place as of August 11, 2011 and August 28, 2011 only.

Action to be taken in open session.

Municipal Planning Incentive Grant Program

1. Peppadew Fresh, LLC
SADC #13-0422-PG
Block 170, Lot 8.01
Marlboro Township, Monmouth County, 14 Acres
Development Easement Value at \$20,000.00 per acre based on current zoning and environmental regulations in place as of December 1, 2010 only.

Action to be taken in open session.

B. ATTORNEY/CLIENT MATTERS

1. **Pending Litigation (Status)**
 - a. Quaker Valley Farms, Franklin Township, Hunterdon County

Note: Secretary Fisher left the meeting at this point. Acting Chairman Alan Danser presided over the meeting.

Deputy Attorney General William Schnurr briefed the Committee on the pending denHollender litigation. He stated that Ms. Daglis will be taking over the litigation case upon his retirement as was mentioned earlier. This case concerns a farm in Hunterdon County, comprising approximately 120 acres and it was preserved in 1993. In 1997 Mr. denHollender purchased the property through Quaker Valley Farms, one of his companies. He is a major producer of horticultural products on the east coast. He purchased it because it is next to another unpreserved farm that he owns. He was leasing part of the farm from Mr. Matthews the previous owner, to put hoop houses on it. In 2007 he began to level approximately 20-25 acres, coming in with heavy earth moving equipment, road graders, bulldozers, etc. He was going to level the area to put up several hundred more hoop houses. The area was sloping ground between 2 to 6 percent sloping and he cut the higher areas down by about 11 feet and then filled in the lower areas by about 14 feet, essentially cutting the area down to bedrock. The SADC was made aware of it and did an investigation and then subsequently authorized the Office of the Attorney General to file suit against him to get the action stopped. The complaint was filed in February 2008 and filed an Order to Show Cause with temporary restraints and that

started the litigation process. He stated that they went up and argued the case to the court that this was not what was meant by farmland preservation and were able to convince the court to issue the temporary restraints that halted him immediately from doing any further grading on the property or continuing with the hoop house construction on the 25 acre area. A couple of months later the court issued a preliminary injunction, which halted his operation for the duration of this case. At the present time he is not able to use that 25 acre for anything, it remains in the condition that it was when the SADC was notified about the situation.

Mr. Schnurr stated that during the last three years, this case has been in the discovery process, partly because we are dealing with an attorney who has not been very cooperative so we couldn't get him to comply with the discovery requests. We are about at the end of that process and probably within another month or two, we will file a motion for summary judgment. That means it is a claim that there are no material facts in dispute in this case and that, as a matter of law, the Judge should award a judgment to the SADC.

What we are asking the court to do is make some interpretations of the Agriculture Retention and Development Act (ARDA). This case is one of first impression and the findings that we are asking the court to make have never been addressed in court before. What we are asking the court to do essentially is find that, even though the ARDA in the deed of easement allows for some land movement on a farm, we are asking the court to make a finding that this farmer went too far and rather than putting up structures that support a farming operation that uses the land, his operation is these hoop houses and nothing he grows in the hoop houses requires the land that this farm is on. He has destroyed the soils on the site by digging it up, moving it around, mixing it up. He stated that he learned that soil is not just the top soil going on a property but you are really dealing with a series of soil layers called "horizons", all of which have various physical, chemical and biological properties and someone coming in and digging this up, pushing it all around, while the many soil particles may be there what he has done is destroyed the soil system that was one of the major reasons the SADC decided to preserve the property in 1993.

Mr. Schnurr stated that is where the case is at this point in time. He stated that they expect that Mr. denHollender will oppose the filing of the summary judgment and file a county motion for summary judgment and there will be responses by either side so we are probably looking at another three to four month's process before the judge has all the papers to make a decision on and then it would be up to the judge as to how quickly she moves on it. He stated that they did get the case bifurcated into a liability phase and a damages phase so what we are focusing on right now and what our motion for summary judgment will involve is simply a finding by the court that he is liable for violations of the deed of easement and then a violation of the ARDA. After that phase is done, depending on how it turns out, they we will move into the second phase and there will probably be trail on damages, either us seeking damages from Mr. denHollender or, if we were to lose the case, him seeking damages from us. However, we don't expect to lose.

Mr. Schnurr stated that there are three experts involved in this case on our side. One is a retired soils scientist from the NRCS and he is going to testify as to how soils are formed,

why the various horizons are important and what kind of damage Mr. denHollender did to the soils himself as a result of his activities. The second expert is a civil engineer who is going to testify as to how much soil was moved on the property. We were able to find some aerial topography from the site from the early 2000's that shows the area's condition before Mr. denHollender began digging it up. We have had a new aerial topographic survey done by this engineer and he is comparing it and he will then testify as to how deep the cuts were, how deep the fills were and how much soil was moved around on the site. Then we hired another soils scientist and an agronomist who will go in there examine the site and he is going to testify that his examination of test pits shows that the property did indeed have prime farmland soils on the site, which is why the SADC preserved it. He is going to testify that based on his examination of the test pits that he dug the soil that remains there is consistent with this being a prime farmland soil and he is also going to draw conclusions as to what type of soils are there now based on USDA soils classifications and then he is going to compare the agricultural productivity of the site in its original condition with prime soils and the agricultural productivity of the soil as he determines it to be now, which in most areas of the site is basically zero, there is no agricultural productivity left. He has also developed a restoration plan for the site, which will not bring it back to what it was but it will restore "some" agricultural productivity to the site to a very limited extent and it will involve bringing in selected materials, refilling the site, re-contouring it and putting top soil on the site, then mixing in various soil amendments to restore some agricultural productivity. His estimate of the price tag for that is \$3 million. That is what we hope to secure from Mr. denHollender.

Chairman Fisher stated that he is going to presume that the SADC will prevail in the case and he will assume that soil has been degraded to the point that it has no agricultural production value. Mr. Schnurr stated that the landowner's arguments are that one of the primary purposes of the ARDA is to preserve land for agriculture and this land, denHollender will argue, is still preserved for agriculture, because what he is doing on the site is an agricultural activity. The Committee does not dispute that. But he is viewing the mandate to preserve land is simply preserving a designated spot on the face of the earth and we are saying that is not what ARDA means. We are saying to the judge that when it says preserved land it means to preserve the soils on that land because that is one of the reasons the SADC decided to preserve that land. If the court doesn't agree with that, then basically any brownfield site or abandoned parking lot in the state would be eligible for farmland preservation and that clearly is not what the legislature meant when it passed the ARDA.

Mr. Schilling stated that during public comment in open session a comment was made about secret negotiations going on in this case. He asked if anyone can attend the litigation case in court? Ms. Schnurr stated that it is open to the public and anyone can attend. Mr. Schilling felt that the earlier statement was irresponsible.

Mr. Schilling asked if the SADC was contesting whether soils were removed? Is that being pursued or contested? Mr. Schnurr stated that they did look at that. The Deed of Easement does allow for soil to be either removed from a property or brought to a property if it is done in conjunction with an agricultural activity. We also had some neighbors complain that there were dump trucks going in and out of the property and they

knew that soil was being removed because the trucks sounded empty going in and full coming out. What we had the engineering expert do as part of his analysis is have him do a cut and fill balance. He looked at the amount that was cut, the amount that was filled and looked at the amount of top soil that was stockpiled. It was his opinion that the analysis he was able to determine was cut, filled and stockpiled versus the total amount of soil that should have been there was so close that it was in a reasonable margin of error. His conclusion was that there was not substantial amount of soil taken out.

Mr. Schilling stated that what Mr. Schnurr is suggesting is that the nature of the activity that he is doing, the greenhouses or the hoop houses, could be done irrespective of how good the soil is. He is wondering if we are setting ourselves on a path where there could be implications of a broader precedent about the use of agricultural structures on land and we'll rely on the underlying quality of the land? Ms. Payne stated that the deed says that you cannot do anything that is detrimental to soil conservation. That is a big piece of the case. Mr. Schnurr stated that they are not asserting that a farmer can never put a structure on a preserved farm or do something that is divorced from the soil. What we are saying is that denHollender is doing something that is divorced from the soil and he didn't need to destroy 25 acres of prime soils to do that.

Mr. Waltman felt that the SADC is very vulnerable in this lawsuit. This Committee for many years have been thinking about, but not acting, not doing anything to limit what someone can do to cover entirely a piece of preserved ground. You could, if you so wished, because nothing would preclude it, at least explicitly, from covering an entire preserved farm with concrete and put buildings on it. How are we going to win this lawsuit if we are going to say there are no limits to what you can otherwise do on a farm? We are trying to maintain two positions that are in conflict. He asked if Mr. Schnurr agreed with him at all that it is hard to maintain the position that we have on denHollender but turn a blind eye to covering soil with concrete and putting up glass greenhouses on a preserved farm. Mr. Schnurr stated that it is a weak point in the case. You cannot find them liable for violating a law unless they know what the law is. The SADC does not have any regulations as to how much impervious cover you can put on a farm or how much soil can be moved around to construct farms, silos or roads to get out to service fields. It is his understanding that the SADC has been looking at that issue for a long time and at this point all he can do is to urge the SADC to try and make continued progress on that issue because one of the things that may come up when the summary judgment is being argued is the judge may turn to her and say she is sympathetic to the argument but how is Mr. denHollender supposed to know where the line was or when he crossed the line. That can be somewhat explained by simply saying that the SADC never anticipated that someone would destroy a preserved farm in this fashion. You cannot anticipate everything that everyone is going to do before they do it. So the judge's next question is likely to be...well I can accept that, but now that you know that this problem exists, what are you doing to address it and set those limits so other farmers know how far they can go? Mr. Waltman stated that it would be in the best interest of this Committee to develop standards. He was pleased at the last subcommittee meeting, however, that we did start looking at the making of some type of policy.

ADJOURNMENT

There being no further business, it was moved by Mr. Schilling and seconded by Ms. Reade and unanimously approved to adjourn the closed session at 12:52 p.m.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Susan E. Payne".

Susan E. Payne, Executive Director
State Agriculture Development Committee

Attachment

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